FILED
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ALEXANDER L. STEVAS,

No. 82-485

IN THE

Supreme Court of the United States

October Term, 1982

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., LARRY FLYNT, LFP, INC., and L.F.P., INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed September 14, 1982
Certiorari Granted January 24, 1983

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order and Opinion of the District Court for the District of New Hampshire, filed June 18, 1981 ..... 2a

Judgment of the District Court for the District of New Hampshire, filed June 19, 1981 ..... 1a

Opinion of the Court of Appeals for the First Circuit, entered June 16, 1982 ..... 11a

No. 82-485

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1982.

KATHY KEETON,

Petitioner,

vs.

HUSTLER MAGAZINE, Inc., LARRY FLYNT, LFP, Inc. and L.F.P., Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Chronological List of Relevant Docket Entries.

October 21, 1980—Plaintiff's Complaint filed in U.S. District Court for District of New Hampshire.

November 4, 1980—Plaintiff's Motion to Amend Complaint granted and Amended Complaint filed.

Chronological List of Relevant Docket Entries

December 15, 1980—Defendants' Motion to Quash Service of Process and to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue, and for Insufficiency of Process, and for Alternative Relief.

December 30, 1980—Plaintiff's Objection to Defendants' Motion to Quash Service of Process; to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue; and for Insufficiency of Process.

January 6, 1981—Plaintiff's Addendum to Plaintiff's Objection.

April 9, 1981—Hearing on motion to dismiss.

June 18, 1981—Opinion of the District Court granting defendants' motion to dismiss.

June 19, 1981—Judgment of District Court entered dismissing plaintiff's complaint.

June 25, 1981—Plaintiff's notice of appeal filed.

June 16, 1982—Opinion of the Court of Appeals for the First Circuit affirming the dismissal of plaintiff's complaint.

Plaintiff's Complaint, Filed October 21, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

1. Plaintiff is a resident of the City and State of New York.

2. Defendant Hustler Magazine, Inc. is an Ohio corporation with a listed principal place of business at 36 West Gay Street, Columbus, Ohio, and with offices at 2029 Century Boulevard, Los Angeles, California, and is engaged in the business of publishing a magazine known as "Hustler Magazine" which is and was at all relevant times circulated throughout all of the states of the United States, including the State of New Hampshire and throughout major countries of the world.

3. Defendant Larry C. Flynt resides at 364 St. Cloud, Bel Air, California, and has a place of business at the offices of Hustler Magazine, Inc. at 2029 Century Boulevard, Los Angeles, California, and is the publisher, owner and editor of the defendant, Hustler Magazine, Inc., and established at all relevant times the content of Hustler Magazine, including, but not limited to, the direction and control over a certain illustration (attached as Exhibit A) knowing and intending that such illustration would be displayed in Hustler Magazine.

4. Defendant, LFP, Inc. is registered as a foreign corporation in the State of California with a corporation number 922871 and has listed as agent for service, Otto

Mueksch of 2029 Century Park East, Suite 3800, Los Angeles, California 90061 and is, on information and belief, the successor corporation of L.F.P., Inc., an inactive California corporation incorporated on January 27, 1975, which is believed to have had general supervisory control over Hustler Magazine, Inc. at all times relevant to the allegations claimed herein.

5. Defendant L.F.P., Inc. is an Ohio corporation with its principal place of business listed as 36 West Gay Street, Columbus, Ohio, with offices at 2029 Century Boulevard, Los Angeles, California, and is the parent corporation of the defendant, Hustler Magazine, Inc. and, as such, is responsible for the content and tone of Hustler Magazine.

6. The above-mentioned defendants had long before May, 1976, and have continued to date to publish, edit, deliver and sell thousands of Hustler Magazines per month within the State of New Hampshire and, specifically, the May, 1976 issue of Hustler Magazine was sold to several thousand purchasers within the State of New Hampshire between April 1 and May 4, 1976.

7. As a result of the distribution and offering for sale of the May, 1976 issue of Hustler Magazine, the above-mentioned defendants committed a tortious act within the State of New Hampshire by offering for sale and selling thousands of Hustler Magazines containing a certain cartoon which was false and defamatory of the plaintiff.

8. The amount in controversy exceeds Ten Thousand Dollars ($10,000) as is required by 28 USC §1332.

Plaintiff's Complaint, Filed October 21, 1980

9. In or about May, 1976, the defendants published in Hustler Magazine a cartoon and caption concerning the plaintiff, a copy of which is marked Exhibit A, attached hereto and incorporated herein by reference.

10. In or about May, 1976, the defendants published in the aforesaid Hustler Magazine the following words:

> "Lissen you Pope-baiting, angel-faced greaseball! You don't need Vaseline to make yer camera fuzzy and romantic; just smear on a muff full of this runny clap you gave me!"

Said words were published in context with a cartoon depicting, in identifiable form, the plaintiff, Kathy Keeton.

11. In the context of said publication, the plaintiff, Kathy Keeton is depicted as having a loathsome disease.

12. The matter so published is false and defamatory.

13. At the time of such publication, the defendants knew that the matter was untrue, and in publishing such false and defamatory matter, the defendants were actuated by actual malice and wrongfully, recklessly, maliciously, wantonly and willfully intended by said publication to injure the plaintiff.

14. The defendants' wrongful intent and wanton and malicious purpose are further evidenced by prior innuendo and statements published by defendants in issues of Hustler Magazine published prior to the May, 1976 issue.

Plaintiff's Complaint, Filed October 21, 1980

15. By reason of the said publication of the false and defamatory matter of and concerning the plaintiff, plaintiff was injured in her good name and suffered pain, mental anguish and humiliation, and was injured in her business and has been held up to contempt, reproach and ridicule, and has been irreparably injured in her reputation.

WHEREFORE, the plaintiff, Kathy Keeton, prays for compensatory damages against the defendants in the amount of Forty Million Dollars ($40,000,000), together with "enhanced compensatory damages" which may be allowed under New Hampshire law against the defendants for their malicious and intentional infliction of injury on the plaintiff in the amount of Forty Million Dollars ($40,000,000), her reasonable attorneys' fees and her costs herein expended; and plaintiff prays for such other and further relief to which she may be entitled.

Respectfully submitted,

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Of counsel:
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(212) 888-1900

Plaintiff's Complaint, Filed October 21, 1980

Demand for Jury Trial.

Plaintiff demands trial of this cause by a jury.

W. MICHAEL DUNN

Plaintiff's Complaint, Filed October 21, 1980

Plaintiff's Amended Complaint, Filed November 4, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Count II

16. Paragraphs 1 through 5 of the initital Complaint in the above-captioned matter are herein repeated with the same force and effect.

17. The above-captioned defendants had, on or before September, 1975, up to and including July, 1976, and continuing to date, published, edited, delivered and sold thousands of issues of Hustler Magazine per month within the State of New Hampshire; specifically, the following issues of Hustler Magazine were sold to several thousands of purchasers within the State of New Hampshire: September, 1975; October, 1975; The Best of Hustler #2 (published in the latter part of 1975); and July, 1976.

18. As a result of the distribution, sale and offering for sale of the above issues, the defendants committed tortious acts within the State of New Hampshire by maliciously, intentionally and falsely identifying a 50-year old model posing in the nude to be the plaintiff, Kathy Keeton.

19. The 50-year old model identified by defendants as Kathy Keeton was known by them not, in fact, to be the plaintiff, and further, the centerfold depiction and other photographs of the model were deliberately placed within the September, 1975 issue of Hustler Magazine as an intentional

act to embarass the plaintiff, Kathy Keeton, and to hold her up to public obloquy and ridicule.

20. At the time of the September, 1975 publication, the defendants knew the photographs of the female model were not those of the plaintiff, Kathy Keeton, and further, the defendants knew the model's true name which, in no way, was similar to the name of the plaintiff.

21. The defendants further defamed the plaintiff by indicating in the text above a photograph of the nude model that Kathy Keeton stated:

> " 'This is the time of my life.' says Kathy Keeton, who past the half century mark this past June. 'I can have my pick of men, depending on my mood—the mature, experienced guy if I'm into a sweet leisurely fuck, or the young muscular stud, if I want a rip-snorting sweathog work-out!' After spending her career in magazine publishing, Kathy Keeton had been semi-retired in Georgia—until we asked her to pose for our centerfold. 'I used to work for a magazine like HUSTLER, but not as good,' says Kathy, 'and I always wanted to pose . . . But I think the Publisher—like many men—was hung up on teeny-boppers. That's his mistake!' We agree."

22. Such statements were known to the defendants not to be statements made by the plaintiff; however, defendants intended by innuendo to use such statements to further identify the plaintiff with the photographs by representing that the model was a former employee of a man's magazine when, in fact, they knew the plaintiff was

associated with Penthouse Magazine, and further knew that many of defendants' readers knew plaintiff to be so associated.

23. The defendants further defamed the plaintiff, Kathy Keeton, by falsely representing that the plaintiff made the following statements:

> " '. . . I shucked my virginity 35 years ago—before many of my present day lovers were born! The circumstances aren't important now. All I know is that I wanted sex then, and got it, and loved it. And I've been wanting it, and getting it, and loving it ever since . . . Don't sing any 'September Song' for me—with all the sex I'm getting, I never felt so alive!' "

24. The defendants, in addition to the 8-page feature contained in the September 1975 issue of Hustler Magazine (attached as Exhibit B) published, as part of the feedback section of Hustler Magazine, in October of 1975, a photograph of the same individual whom they again falsely identified as Kathy Keeton. (This photograph and feedback section are attached as Exhibit C.) Further, the defendants, toward the latter part of 1975, published "The Best of Hustler #2" wherein they reprinted many of the photographs which appeared in the September, 1975 issue in an article entitled "Kathy Keeton—Who Says You're Over the Hill at 50". (These photographs are attached as Exhibit D.) The defendants again, in July of 1976, in Hustler Magazine at page 13, republished a smaller version of the original September, 1975 centerfold and indicated "readers roared approval over Kathy

Keeton, the foxy 50-year old centerfold", (photograph and accompanying text attached as Exhibit E).

25. At the time of the publications, the defendants knew that the photographs and accompanying stories and statements did not represent either statements or depictions of the plaintiff, Kathy Keeton, and in publishing such false and defamatory matters, the defendants were actuated by actual malice and wrongfully, recklessly, maliciously, wantoningly and willfully intended by such publications to injure the plaintiff.

26. The defendants' wrongful intent and wanton and malicious purposes were further evidenced by the fact that a reader of Hustler Magazine mailed in his photograph to Hustler with a letter indicating that he wanted to meet the "50-year old centerfold". Hustler Magazine promptly forwarded his letter to the plaintiff, Kathy Keeton, thus demonstrating that, in the minds of Hustler Magazine's personnel, the lewd photographs which appear as Exhibits B through E were unlawfully intended to be held out to the public to be photographs of the plaintiff, Kathy Keeton.

27. By reason of the publications of the false and defamatory material listed above, the plaintiff was injured in her good name and suffered pain, mental anguish and humiliation, and was injured in her business and has been held up to contempt, reproach and ridicule, and has been irreparably injured in her reputation.

28. The amount in controversy exceeds Ten Thousand Dollars ($10,000), as is required by 28 USC §1332.

Plaintiff's Amended Complaint, filed November 4, 1980

WHEREFORE, the plaintiff, Kathy Keeton, prays for compensatory damages as to Count II against the defendants in the additional amount of Forty Million Dollars ($40,000,000), together with enhanced compensatory damages which may be allowed under New Hampshire law against the defendants for their malicious and intentional infliction of injury on the plaintiff in the amount of Forty Million Dollars ($40,000,000), her reasonable attorneys; fees and her costs herein expended; and plaintiff prays for such other and further relief to which she may be entitled.

Respectfully submitted,

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Demand for Jury Trial.

Plaintiff demands trial of this cause by a jury.

W. MICHAEL DUNN, Esquire

Exhibits A, B, C, D and E, Attached to Plaintiff's Amended Complaint.

(Reproduced at following pages 15a to 33a.)

HUSTLER

FOR THE MEN OF THE WORLD

EXCLUSIVE

FIFTY-YEAR-OLD CENTERFOLD

CONVERSATION WITH

IN DEPTH LOOK AT

GEORGE WALLACE

THE PEOPLE'S

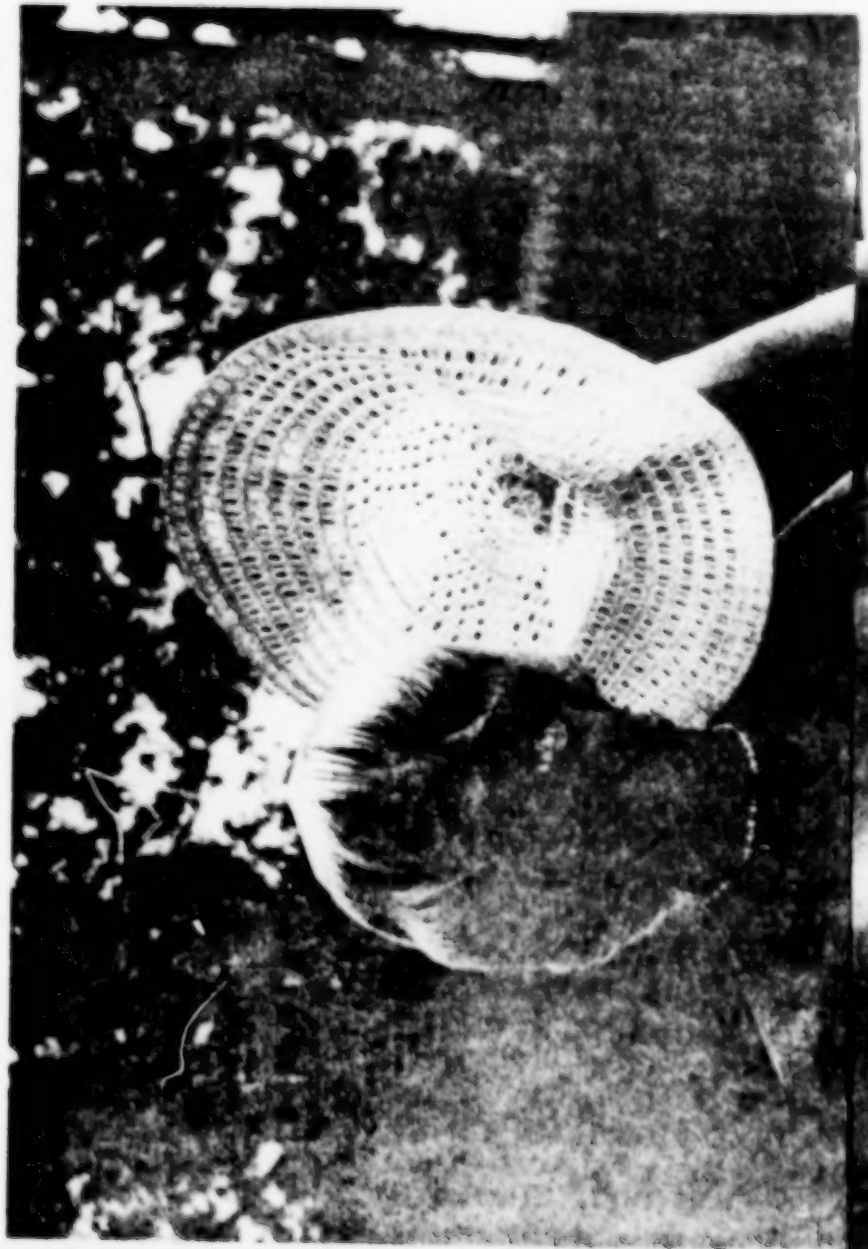
RELUCTANT

CHOICE

$1.75

HUSTLER
VOL. 2 NO. 6 SEPT. 1975

20a



21a

HUSTLER
FOR THE REST OF THE WORLD
$3.75
POLYGAMIST
ALEXANDER JOSEPH'S
LIFE WITH 13 WIVES
T. RUSTY CALLEY--
WHERE TO FROM
MY I.A.I?
PLAINTIFF'S
EXHIBIT
7

FEEDBACK

THE BEST OF HUSTLER #2

THE YEAR IN REVIEW

MORE JACKIE O IN THE NUDE

BUTCH AND FEMININE BLACK ON WHITE IN COLOR

OUR 50 YEAR OLD HUSTLER HONEY

HALF-MAN HALF-WOMAN

SHAVED BEAVER

THE BEST OF HUSTLER

BITS & PIECES

A collection of outrageous assaults, insults and put-ons from HUSTLER's famous eye-gouging insanity section.

SEX PLAY

In a short span of time, the practice of tiel fucking has moved into the spotlight of sexual experimentation. HUSTLER gives this latest kink a short-arm inspection.

EVELYN

For sheer erotic impact, our home-town girl is the year's standout — or should we say stand-up? And on top of everything else, she's really a beautiful broad.

MANNY & FAYE

M. V. Clayton's powerful tale of young lovers trapped by a sadistic and vengeful society is a gut-tightening view of a world that might just come to pass.

BARE BEAVER

She was beautiful in all her blonde pubic glory, what would she be like with every blonde, curly hair teasingly shaved off? Better than ever!

HANK WILLIAMS, JR.

Growing up in daddy's footsteps is sometimes the outline for personal tragedy, and the late Hank Williams's son's story seems to prove it.

KATHY KEETON

Over the hill at 50? Not for this fiery lady, whose fine boobs and pubes could make a lot of teenagers pee green with envy.

SCREWING *SCREW*

HUSTLER Executive Editor Bruce David traveled to Wichita, Kansas, to observe the obscenity trial of *Screw* Publisher Al Goldstein. His report on that hectic party details what is clearly the beginning of a fresh assault on our personal liberties.

A DAY IN THE LIFE OF A GYNECOLOGIST

It's all swabs, tests, sterile pokings and proddings, right? Wrong. Our gyno crosses the barrier from science to sensuality with a wet and willing patient.

NEVER FUCK WITH KARMA

In this tour de force, Harold Norse creates a not-so-typical dirty old man who, when not too busy trying to get laid, writes poetry and fucks with the mind of his newly found child-woman. That sure is some kind of karma!

LIZ RAY

A cheap prostitute who sold her favors for $14,000 a year to the most powerful men in Congress, she wound up bringing down Congressman Wayne Hays's world. See the loose lips that sank Hays's ship.

JACKIE O

The twice-widowed jet setter is still the hottest subject in the gossip pages, and HUSTLER is happy to offer yet another viewing of the nude photos of Jacqueline Kennedy Onassis.

BUTCH AND HIS GEORGIA PEACH

This pictorial of a black stud (and that is an understatement when you get an eyeful of his horsecock) and his hung-up Georgia peach drew tons of mail as well as a ton of male penis envy. Move over, porno stars, there's new meat in town.

CHESTER THE MOLESTER

HUSTLER's put-on pervert — the creation from the padded brain cells of our Humor and Cartoon Editor Dwaine B. Tinsley — is a real grabber in this cartoon vignette of a day at the submarine races.

HUSTLER HUMOR

Tinsley again, this time picking the absolutely raunchy best gut busters from recent humor pages.

GETTING IT UP FOR THE GAME

Does balling screw you up for football? Curt Richards investigates this question and finds some wild, satirical answers.

TORRID TINA

Tina's ego, a tigress who gets it off by getting it out — her body, that is, for one and all to enjoy. So enjoy!

MOTHERHOOD

To some, a pregnant woman's swollen body is something to be hidden by layers of clothing. But to HUSTLER, she is beautiful and this taboo-shattering pictorial will show you why.

THE FARMER'S DAUGHTER

The first appearance of this pubescent beauty in our "Adolescent Fantasy" pictorial triggered a storm of controversy. Now she is back home on the farm, as ripely lush as ever — and you'll find that she raises more than just beans and squash.

PAT, THE FUCKING ULTIMATE

Words are simply wasted in this pictorial.

JOE — er — ah — JOSEPHINE

You gotta see it to believe it. To help convince all the doubters, here she ... er, he ... oh, well, here it is again.

KINKY KORNER

The kind of chicks this drummer uses gives off a different sound when he sticks it to a sorority slut.

HUSTLER
ANNIVERSARY ISS
LIFE-SIZE CENTERFOL
FOR THE REST OF THE WORLD
JULY 1976 $2.25
SUPER
BICENTENNIAL
EDITION

Defendants' Motion to Quash Service of Process and to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue, and for Insufficiency of Process, and for Alternative Relief, Filed December 15, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Without otherwise entering appearance herein, the Defendants each specially move this Honorable Court, pursuant to the provisions of 28 U.S.C. §§1391, 1404(a), 1406(a), and Rules 12(b)(1), (2), (3), (4), and (5), *Fed. R. Civ. Proc.*, for dismissal of this action and of the Complaint and Amended Complaint.

The Plaintiff is and at all pertinent times has been a citizen of New York, having absolutely no cognizable nexus with New Hampshire. The Defendants are an individual California resident, and two California-headquartered corporations. At the times of publication of the *Hustler* issues in question, the said Defendants resided or had their principal place of business offices in the State of Ohio.

Under all the circumstances pertinent to the Plaintiff's filing in this Court, lack of subject matter and personal jurisdiction, improper venue, insufficiency of process and of the service thereof, each and all require dismissal of this action.

The State of New Hampshire, through this federal district has no interest in this litigation which will be served by permitting it to be maintained here.

The defendants each alternatively and secondarily move for a change of the venue of this action pursuant to the

provisions of Title 28 U.S.C. §§1391, 1404(a), and 1406(a). The proper federal district or state courts for the filing of this action, if any there be, *arguendo*, are located only in the State of California or in the State of New York.

The defendants also ask that service of process upon each of them be quashed.

The law, the principles of fair play and substantial justice by which the law shall be interpreted, and the ground of *forum conveniens*, all require that the within motions be granted.

Movants submit the following Memorandum, documents and affidavits in support of this Motion.

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By C. WILLIAM BROWNFIELD, Esquire
Attorneys for the Defendants

Affidavit of Jim Kohls, Sworn to November 26, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes Jim Kohls, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is the vice president of operations of the defendant, L.F.P., Inc. At all pertinent times he has resided in Los Angeles, California.

2. That the defendant, L.F.P., Inc. is the correct corporate designation for one of the corporate defendants herein and there is no corporation known as LFP, Inc. and this Affidavit is made on behalf of L.F.P., Inc. and LFP, Inc.

3. Defendant, L.F.P., Inc. is a corporation duly organized and existing under the laws of the State of Ohio and at all times pertinent herein until mid 1978 had its principal place of business at 40 West Gay Street, Columbus, Ohio and since mid 1978 has had its principal place of business at 2029 Century Park East, Suite 3800, Los Angeles, California.

4. Defendant, L.F.P., Inc. is a bonafide holding company existing pursuant to laws of the State of Ohio and has no other assets other than the stock of the various subsidiary corporations which it owns including another of the corporate defendants herein, Hustler Magazine, Inc.

Affidavit of Jim Kohls, Sworn to November 26, 1980.

5. Defendant, L.F.P., Inc. publishes nothing and has no control be it directly or indirectly over the editorial content of the publication involved herein, Hustler Magazine.

6. All of the corporate meetings, whether those of its shareholders or directors, or of its officers in the ordinary course of business of the defendant, L.F.P., Inc. are held solely in the State of California. No officer, director or shareholder of the defendant, L.F.P., Inc. is or at any pertinent time has been a resident of the State of New Hampshire.

7. Defendant, L.F.P., Inc. employs no salesmen in the State of New Hampshire and indeed employs no salesmen at all and solicits no sales within the State of New Hampshire or any other state in the United States.

8. Defendant, L.F.P., Inc. does not transact or conduct business in the State of New Hampshire and has no business activity whatsoever in the State of New Hampshire.

9. Defendant, L.F.P., Inc. is not licensed and is not required to be licensed as a foreign corporation in the State of New Hampshire, inasmuch as no business is transacted or conducted by said corporation in the State of New Hampshire.

10. Defendant, L.F.P., Inc. has not registered or licensed any product, service or trade name in the State of New Hampshire.

11. Defendant, L.F.P., Inc. owns no real estate or personalty located in the State of New Hampshire.

Affidavit of Jim Kohls, Sworn to November 26, 1980.

12. Defendant, L.F.P., Inc. rents no warehouse, office, or other space in the State of New Hampshire; utilizes no vehicles or other forms of transporation to conduct any business within the State of New Hampshire; is listed in no telephone directory in this judicial district or in the State of New Hampshire and maintains no bank or savings accounts in the State of New Hampshire.

13. In summation, the defendant, L.F.P., Inc. has absolutely no contact of any nature with the State of New Hampshire.

14. Each of the foregoing facts is true not only at the present time but just as accurately pertains to all times relevant to these proceedings as described in the Complaint.

Further Affiant saith naught.

JIM KOHLS

(Jurat omitted in printing.)

Affidavit of Larry Flynt, Sworn to November 26, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now, comes Larry Flynt, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is and at all relevant times hereto has been the publisher of Hustler Magazine. At all pertinent times he has resided until mid 1978 in Columbus Ohio and currently resides in Los Angeles, California.

2. He is the individual defendant named in this action.

3. He does not transact or conduct any business in the State of New Hampshire and has no business activity whatsoever in the State of New Hampshire.

4. He owns no real estate or personalty located in the State of New Hampshire.

5. He rents no warehouse, office, or other space in the State of New Hampshire; utilizes no vehicles or other forms of transportation to conduct any business within the State of New Hampshire; is listed in no telephone directory in this district or in the State of New Hampshire; and maintains no bank or savings accounts in the State of New Hampshire.

6. He has never resided in the State of New Hampshire, has never owned a home in the State of New Hampshire

and has never leased or rented an apartment or home in the State of New Hampshire.

7. In summation, defendant has had absolutely no contact with the State of New Hampshire.

8. Each of the foregoing facts is true not only at the present time but just as accurately pertains to all times relevant to these proceedings as described in the Complaint.

Further Affiant saith naught.

LARRY FLYNT

(Jurat omitted in printing.)

Affidavit of Larry Flynt, Sworn to November 26, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes Larry Flynt, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is and at all relevant times hereto has been the publisher of Hustler Magazine, the magazine involved herein and is and at all relevant times hereto has been the chairman of the board of one of the corporate defendants herein, Hustler Magazine, Inc. At all pertinent times he has resided until mid 1978 in Columbus, Ohio and since that time and currently resides in Los Angeles, California.

2. Defendant, Hustler Magazine, Inc. wholly owns and publishes Hustler Magazine; the principal business office of said corporate defendant, Hustler Magazine, Inc. was located until mid 1978 at 40 West Gay Street, Columbus, Ohio and is currently located at 2029 Century Park East, Suite 3800, Los Angeles, California. Defendant, Hustler Magazine, Inc. is incorporated under the laws of the State of Ohio. All of its corporate meetings, whether those of its shareholders or directors, or of its officers in the ordinary course of business were held until mid 1978 within the State of Ohio and since mid 1978 in the State of California. No officer, director or shareholder of Hustler Magazine, Inc. is or at any pertinent time has been a resident of New Hampshire.

Affidavit of Larry Flynt, Sworn to November 26, 1980

3. Hustler Magazine, Inc. employs no salesmen in the State of New Hampshire and indeed employs no salesmen at all, and solicits no sales within the State of New Hampshire except as it is done through the appearance of said magazine itself as sold in interstate commerce.

4. Hustler Magazine, Inc. does not transact or conduct business in the State of New Hampshire, and except as herein noted has no business activity whatsoever in the State of New Hampshire.

5. Hustler Magazine, Inc. is not licensed and is not required to be licensed as a foreign corporation in the State of New Hampshire, inasmuch as no business is transaction or conducted by said corporation in the State of New Hampshire.

6. Hustler Magazine, Inc. has not registered the name of Hustler Magazine as a trade name in the State of New Hampshire and has not otherwise registered or licensed any product or service in the State of New Hampshire.

7. Hustler Magazine, Inc. owns no real estate or personalty located in the State of New Hampshire, with the sole exception, as to personalty, being those Hustler Magazines being periodically sold in New Hampshire through the means of distribution referred to above.

8. Hustler Magazine, Inc. rents no warehouse, office, or other space in the State of New Hampshire; utilizes no vehicles or other forms of transportation to conduct any business within the State of New Hampshire; is listed in no telephone directory in this district or in the State of New

Hampshire; and maintains no bank or savings accounts in the State of New Hampshire.

9. All subscriptions sales of Hustler Magazine are approved in the California office of Hustler Magazine, Inc.

10. All retail sales of Hustler Magazine are handled by a distribution network through wholesalers and retailers totally independent from Hustler Magazine, Inc.; further Hustler Magazine, Inc. has no ownership interest, either directly or indirectly, of any nature whatsoever with said wholesalers and retailers located in the State of New Hampshire.

11. Referring to the issues of Hustler Magazine involved herein, that is, the September, 1975 issue and the May, 1976 issue gross revenues from the sale of said magazines in New Hampshire constituted less than 1% of its total sales in the United States.

12. Other than the foregoing, Hustler Magazine, Inc. has absolutely no contact with the State of New Hampshire.

13. Each of the foregoing facts is true not only at the present time but just as accurately pertains to all times relevant to these proceedings as described in the Complaint.

Further Affiant saith naught.

LARRY FLYNT

(Jurat omitted in printing.)

Affidavit of Robert A. Adelman, Sworn to December 19, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes Robert A. Adelman, first being duly cautioned and sworn, and of his own knowledge and belief deposes and states as follows:

1. He is the general counsel of the defendant, Hustler Magazine, Inc. At all pertinent times he has resided in Los Angeles, California.

2. That he has made a thorough and exhaustive search of the business records, kept in the ordinary course of business, of the defendant, Hustler Magazine, Inc.

3. That, pursuant to his review of the business records of the defendant, Hustler Magazine, Inc., he states that during the time period in question as alleged in the plaintiff's complaint and amended complaint, the defendant, Hustler Magazine, Inc. had no affiliates, subsidiaries, or any ownership interest of any nature whatsoever with any entities in the State of New Hampshire.

4. That, pursuant to his review of the business records, he states that during the time period in question as alleged in the plaintiff's complaint and amended complaint, the defendant, Hustler Magazine, Inc. derived no advertising revenues from advertisers located in the State of New

Hampshire nor were any advertisements placed from persons or entities known to be residing or located in the State of New Hampshire.

5. That, pursuant to his review of said business records, the September, 1975 and October, 1975 issues of Hustler Magazine were printed by Great Eastern Color of Poughkeepsie, New York and that the May, 1976 and July, 1976 issues of Hustler Magazine were printed by Dayton Press, Inc. of Dayton, Ohio.

6. That, except for the plaintiff, Robert Guccione, and the employees of Penthouse Magazine and its affiliated magazines, all witnesses which would be expected to be called by the defendants and all exhibits which would be utilized by the defendants are located in the State of California. Several of the witnesses to be called by the defendant, Hustler Magazine, Inc. are no longer employees of the defendant, Hustler Magazine, Inc. and are not subject to their call as witnesses except under subpoena.

7. That one of the other defendants, Larry Flynt, is a paraplegic and is only ambulatory through the use of a wheelchair. Further, that the defendant, Larry Flynt, is under the constant care and treatment of numerous medical practitioners all located in Los Angeles, California and further, the defendant, Larry Flynt, because of his medical condition and paraplegia is prevented from traveling from his residence in Los Angeles, California or from

Affidavit of Robert A. Adelman, Sworn to December 19, 1980

any other situs, at which he may, from time to time, receive treatment or care for said medical condition.

Further Affiant saith naught.

ROBERT A. ADELMAN

(Jurat omitted in printing.)

Affidavit of C. William Brownfield, Sworn to December 19, 1980.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW HAMPSHIRE.

(Title omitted in printing.)

Now comes C. William Brownfield, first being duly cautioned and sworn and deposes and states as follows:

1. He is and at all pertinent times has been co-counsel for the defendants in the Ohio litigation referred to in defendants Memorandum in Support, to which this affidavit is attached, both in the trial and appellate proceedings.

2. Of his personal knowledge, affiant verifies that each of the Exhibits, with the exception of Exhibit C, attached to defendant's Memorandum in Support are true and accurate copies of Exhibits, or of transcripts of proceedings, filed and/or part of the record in the aforesaid Ohio cases, under Franklin County Common Pleas Court Case No. 77CV-05-1692, or Franklin County Court of Appeals Case Nos. 80CV-204 and 80CV-375. With respect to Exhibit C to said Memorandum, Affiant verifies that it is a true and accurate photocopy of a transcript of a portion of the deposition of plaintiff Keeton, taken under due notice and process.

3. Affiant further states that he has drafted and reviewed the factual portions of defendant's said Memorandum in Support, and he hereby verifies the truthfulness of

such facts as asserted as if each of them has been fully rewritten in this affidavit.

Affiant, further, sayeth naught.

C. WILLIAM BROWNFIELD

(Jurat omitted in printing.)

Exhibit B to Defendants' Memorandum in Support—Excerpts from Penthouse Magazine.

A Public Service of This Magazine & The Advertising Council

Bill Cosby says: "When you learn CPR, you're ready to save lives-anywhere."

American Red Cross

PENTHOUSE

The International Magazine for Men/January 1981

Worldwide sales 5,350,000*

EDITOR & PUBLISHER BOB GUCCIONE
EDITORIAL DIRECTOR JAMES GOODE
ART DIRECTOR JOE BROOKS
ASSOCIATE PUBLISHER KATHY KEELEY
SECRETARY-TREASURER ANTHONY GUCCIONE
SENIOR VICE PRESIDENT MARIANNE HOWARTH
SENIOR VICE PRESIDENT JOHN EVANS
CHIEF FINANCIAL OFFICER BERNARD SAMS
EXECUTIVE VICE PRESIDENT FRANKE SULLIVAN

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PENTHOUSE FORUM

Foreplay fever

I am an 18 year old male and, unlike most people, have always believed that the letters in "Forum" were true. Again, unlike most people, I've always known that someday I would have a story published in "Forum."

I am living at home with parents who believe very strongly that sex is wrong unless the two people are married. So, naturally, the roof fell in when they found out I had a sex life.

One sunny day last April, I was discussing my family problems with a good friend of the family, a beautiful redhead named Emily. She is six years older than I (24 years old) and has always been like a big sister to me. When I told her that my parents were upset that I was having sex, I think it turned her on to find out that her "little brother" was not as innocent as she thought. Emily's parents were expecting me to come out and spend a week working on their farm during the summer. That May day when Emily said good-bye, she looked deep into my eyes and softly said, "I'm really looking forward to seeing you out on the farm this summer." I could've sworn I felt a mixture of love and lust beaming from her fiery eyes, but I told myself I was just imagining things.

During the next two months I spent many evenings masturbating while fantasizing about Emily. I was about to burst with sexual tension when at last that hot June day came. I was on a bus only two hours away from the girl of my fantasies. It's a good thing I didn't know what was in store for me, or I would've shot my load right there on the bus.

When I got off the bus, she was waiting for me. Her shorts revealed long, tanned legs. Her braless tits were like two doves hiding in the bushes, as her nipples poked softly but sensuously through her terry cloth shirt. We met in a warm embrace, as would a brother and sister. But my feelings were far from brotherly when I felt her firm tits pressed against my chest.

On the way home from the bus, we stopped at a park. As we lay on the green grass, Emily confided in me that she had been raped at an early age. She had led an active sex life but had never enjoyed sex. She felt that all the guys who made love to her were just using her for their own pleasure.

I told her that when I make love to a girl I concentrate on pleasuring her and that half my pleasure is having a girl intoxicated with ecstasy. Later that day she told me that she had always dreamed to have me for a lover. I told her that the feelings were mutual and tried to contain my throbbing dick in my shorts.

As soon as we got home, she suggested that she show me around. Once behind the barn, we held each other tight. As our lips met, her tongue probed my mouth. My hands caressed her body, lingering at her firm ass. I kneaded her buns, one in each hand, while I pressed her bush against my hard cock. She was driving me wild with her hand on my bare leg. As she inched her way up the leg of my shorts, I let one hand slip up her shirt. By the time my skilled hands reached her tits, she was softly stroking the head of my dick through my underpants. I longed to feel her hand on it.

My hands were making slow circles on the supple skin of her breasts, taking care not to touch her nipples yet. As the circles became faster and closer to her nipples, my desire to see her silken breasts grew stronger. I lifted her shirt to find two of the most perfectly shaped tits I had ever seen. Her erect nipples were the best part. They were like two ripe cherries just waiting to be picked. I wasted no time in sucking one of them into my mouth.

I nibbled and sucked until both nipples were as hard as they could get. Then I took off my shirt and held Emily tight so that her warm, erect nipples were pressing against my chest. Her hips were moving in circles against my throbbing cock. She began to purr like a kitten when my hand started to wander up the inside of her thigh. I slipped my hand up her shorts and let one finger slip inside her panties. My finger softly brushed her pussy hair just long enough to drive her crazy. Then, having not even touched the hot flesh of her pussy, I pulled my finger back out of her panties, which drove her even crazier.

I wanted to feel her hot cunt so bad! But knowing that Emily had never enjoyed sex with a guy before, I was going to take extra care to make sure she enjoyed it with me. So I was planning on getting her so hot and frustrated that she would beg me to put it in. If I could only wait that long, I knew she would enjoy it. So I suggested we get back home.

The next week I spent from 6:00 a.m. to 8:00 p.m. doing farm work. So Emily and I could barely snatch a few intimate moments together each day. But they were enough to keep us turned on 24 hours a day for the whole week.

One of the nights was one night after dinner, when we went out and parked. As she lay in my arms, I held her tight and

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Exhibit C to Defendants' Memorandum in Support—Excerpt from Deposition of Kathy Keeton

IN THE

COMMON PLEAS COURT

OF FRANKLIN COUNTY, OHIO.

ROBERT C. GUCCIONE, *et al.*,

Plaintiffs,

against

HUSTLER MAGAZINE, Inc., *et al.*,

Defendants.

Case No.: 77 CV-04-1692

Deposition of KATHY KEETON, taken by Defendants, pursuant to Order of Honorable Justice J. Craig Wright, at the offices of Grutman and Scharann, Esqs., 505 Park Avenue, New York, New York, on Thursday, August 23, 1979 at 10:08 o'clock in the forenoon, before Charles Shapiro, a Certified Stenotype Reporter and Notary Public within and for the State of New York.

* * *

Exhibit C to Defendants' Memorandum in Support—
Excerpt from Deposition of Kathy Keeton

(8) please.

KATHY KEETON, having been first duly sworn by the Notary Public, was examined and testified as follows:

Examination by Mr. Sturtz:

Q. For the record, will you state your full name, please, and spell it.

A. Kathryn, K-a-t-h-r-y-n, Merle, M-e-r-l-e, Keeton, K-e-e-t-o-n.

Q. Miss Keeton, where do you reside at this time?

A. At No. 8 East 63rd Street.

Q. In New York City?

A. Yes.

Q. Do you go by the name of Kathy Keeton?

A. Yes.

Q. Miss Keeton, you and Mr. Guccione have filed a suit in the Common Pleas Court in Franklin County against Hustler Magazine and Mr. Larry Flynt. I am the attorney for the magazine and Mr. Flynt. I wish to inquire of you concerning the allegations in the complaint and other matters relevant to those matters. My purpose is to find out what your position is, what your story is. I do not try and use trick

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980.

IN THE

COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

ROBERT C. GUCCIONE, *et al.*,

Plaintiffs-Appellees and Plaintiffs-Appellants,

v.

HUSTLER MAGAZINE, Inc., *et al.*,

Defendants-Appellants and Defendants-Appellees.

No. 80 AP-204

Decision

Rendered on September 30, 1980

Grutman & Schafrann, Mr. Norman Roy Grutman, Mr. Jeffrey H. Daichman, of Counsel, 505 Park Avenue, New York, New York 10022, and Vorys, Sater, Seymour &

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

Pease, Mr. Herbert R. Brown, Mr. C. William O'Neill and Mr. Duke W. Thomas, of Counsel, 52 East Gay Street, Columbus, Ohio 43216, For Plaintiffs-Appellees (Appellants).

Brownfield, Bowen, Bally & Sturtz, Mr. C. William Brownfield, Mr. Lyman Brownfield, Mr. Laurence E. Strutz, Mr. George R. McCann, of Counsel, 140 East Town Street, Columbus, Ohio 43215, For Defendants-Appellants (Appellees).

WHITESIDE, J.:

This matter involves two separate appeals from separate orders of the Franklin County Court of Common Pleas, with respect to which that court made findings of no just cause for delay in accordance with Civ. R. 54(B).

One appeal is by plaintiffs from an order dismissing count two of plaintiffs' second amended complaint for the reason that the claim was not commenced within the time provided by the applicable statute of limitations. In support of this appeal, plaintiffs raise a single assignment of error as follows:

> "The trial court erred in granting defendants' motion to dismiss Count II of the Amended Complaint on the ground that it was barred by the New York statute of limitations."

The other appeal is by defendants from an order of the trial court pursuant to Civ. R. 30(G) awarding to plaintiffs expenses and attorneys fees in connection with the failure

of defendant Larry Flynt to appear for the taking of his deposition in Los Angeles, California, on February 11, 1980. In support of this appeal, defendants raise two assignments of error as follows:

> 1. "The trial court erred and abused its discretion in awarding, pursuant to Ohio Civil Rule 30(G), unreasonable attorneys' fees to one of plaintiffs-appellees' attorneys at the rate of $185.00 per hour."
>
> 2. "The trial court erred in computing its award of attorneys' fees to plaintiffs-appellees solely on the basis of the hours expended times the lawyer's hourly rate, and in failing to require additional evidence on the issue of the proper amount of such fees."

Considering first the appeal by plaintiffs, it appears uncontested that count two of plaintiffs' amended complaint attempts to set forth a claim for relief for invasion of privacy as provided by Section 51, New York Civil Rights Law. The parties do not contest the trial court's finding that the substantive law of New York applies to this claim.

Unlike Ohio law, under New York law there is no common-law right of privacy, for invasion of which an action may be maintained for damages. Rather, to the extent that a right of privacy is recognized under New York law, it is strictly a statutory right unknown at common law and provided by Section 51, New York Civil Rights law, providing in pertinent part as follows:

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> "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. • • •"

The issue before us is whether the New York statute of limitations with respect to the New York statutory action should be applied rather than the appropriate Ohio statute of limitations. The trial court applied the New York statute.

Ordinarily, statutes of limitations are considered procedural, and the statute of the forum state will be applied even though the claim for relief arose in another state. The rule is well stated in Restatement of Conflict of Laws 2d 396, Section 142, as follows:

> "(1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

> "(2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in §143."

There is, however, as noted in the restatement, an exception to the general rule that statutes of limitations are procedural so that that of the forum state will be applied, which is stated in Restatement of Conflict of Laws 2d 400, Section 143, as follows:

> "An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy."

There is little Ohio authority upon the issue of when a statute of limitations of another state will be construed to bar the right, rather than merely the remedy. Perhaps this is because of the existence until 1965 of the borrowing statute set forth in former R. C. 2305.20, which provided that, where a cause of action arose in another state, the statute of limitations of that state would be applied if it provided for a lesser number of years than the statutes of this state. The borrowing statute, former R. C. 2305.20, was repealed in 1965, with no substitution being made therefor. Accordingly, prior to 1965, there was no need for judicial determination in Ohio of whether a statute of limitations of another state barred the right, rather than the remedy, since the statute of the state in which the claim for relief arose would be applied in any event if it provided

for a lesser number of years than the appropriate Ohio statute. New York also has a borrowing statute, Section 202, New York Civil Practice Law and Rules, likewise making it unnecessary for judicial construction of application of the rule set forth in Restatement of Conflict of Laws 2d 400, Section 143, *supra*. The issue of whether a statute of limitations bars the right rather than the remedy arises very infrequently with respect to the statutes of the forum state.

In *Pittsburg, Cincinnati and St. Louis Railway Co. v. Hine* (1874), 25 Ohio St. 629, it was recognized that, with respect to statutes creating claims for relief unknown in the common law, a statute of limitations bars the right rather than merely the remedy, at least where enacted by the same act which created the right of action. A similar conclusion was reached in *McVeigh v. Fetterman* (1917), 95 Ohio St. 292, even though the statute of limitations applied was contained in a different section than that creating the right of action, it being stated at pages 294-295 of the opinion as follows:

> "No right exists to maintain an action to contest a will except as it is specifically provided by statute, and the right thus conferred is subject to the conditions and limitations imposed. The right granted and the condition imposed go together; the one cannot be enjoyed without the restrictions and limitations of the other."

Similarly, in *Castrovinci v. Castrovinci* (1952), 93 Ohio App. 133, the general rule was recognized, the court stating at page 138:

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> "• • • where by statute a right of action is given which did not exist by the common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right, and will control, no matter in what forum the action is brought • • • ."

In this case, the New York statute of limitations is not contained in the same act which created the limited statutory claim for invasion of privacy but, instead, is contained in another act enacted some years later. Apparently, Section 51, New York Civil Rights Law was enacted in 1909.

No special statute of limitations was enacted at that time, so that apparently the applicable statute of limitations was that pertaining to actions to recover upon a liability imposed by statute. See present Section 214(2), New York Civil Practice Law and Rules. In 1938, however, New York enacted a special statute of limitations applicable to actions brought for an invasion of privacy pursuant to Section 51, New York Civil Rights Law. Although adopted by a specific act, the act added actions for violations of the right of privacy to a section enumerating various actions required to be commenced within one year. Thus, present Section 215, New York Civil Practice Law and Rules provides as follows:

> "The following actions shall be commenced within one year:
>
> "• • •

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

> "3. an action to recover damages for • • • a violation of the right of privacy under section fifty-one of the civil rights law;
>
> "• • •."

The trial court found this section to be applicable to count two of the amended complaint as one barring the right, not merely the remedy. Plaintiffs contend that the trial court erred because the statute of limitations is not contained in the same act which created the right of action but, instead, is contained in a separate section enacted some years later. Plaintiffs particularly take exception to the comment of the trial court that:

> "The peculiar facts of this case militate toward a policy-based decision in keeping with simple justice and the modern-day trend toward applying limitations on actions in force at the locale of the alleged tort."

The trend may be true; however, it is evinced by borrowing statutes, not by judicial decision. Ohio, on the other hand, had a borrowing statute for many years but repealed it in 1965, as discussed *infra*, indicating a legislative intent contrary to the trend indicated by the trial court.

However, the trial court did not rely solely upon "a policy-based decision" but also relied upon *Myers v. Alvey-Ferguson Co.* (6th Circuit, 1964), 331 F.2d 223, quoting extensively from that case, including the statement that:

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> " '• • • A limitation in a separate statute of the creating state may be a part of the substantive law, if in express terms it is made applicable to the liability created by statute.• • •' "

Among the cases cited by the *Myers* court in support of this statement is *Maki v. George R. Cooke Co.* (6th Circuit, 1943), 124 F.2d 663; 146 A.L.R. 1552, in which the statute of limitations of the state which created the statutory liability was applied, even though it was a general statute of limitations and prescribed a longer period for bringing the action than the applicable statute of the forum state. The *Maki* court stated in part, at pages 1355-1356:

> "We see no valid reason why, if a state creates by statute a right nonexistent at common law and prescribes in the same statute a limitation period for action which by comity will be applied in the forum of a sister state, a limitation, though found in a separate statute of the creative state made applicable in express terms to actions commenced upon a liability created by statute, should not likewise be recognized and applied in the courts of the forum state. • • • "

It appears, however, that full faith and credit does not compel the forum state to apply the statute of limitations of the state where a statutory claim for relief arose. See *Wells v. Simonds Abrasive Co.* (1953), 345 U.S. 514; 73 S.Ct. 856, in which it is stated at page 517:

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> "The rule that the limitations of the forum apply (which this Court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states. However, there have been divergent views when a foreign statutory right unknown to the common law has a period of limitations included in the section creating the right. The Alabama statute here involved creates such a right and contains a built-in limitation. The view is held in some jurisdictions that such a limitation is so intimately connected with the right that it must be enforced in the forum state along with the substantive right.
>
> "* * *
>
> "* * * Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause."

It follows from *Wells* that Comment (b) to Restatement of Conflict of Laws 2d 400, Section 143, correctly states the applicable principle, as follows:

> "Application of the rule of this Section depends upon the local law of the forum. It is for the courts of each state to determine the circumstances in which the rule is applicable. So the forum will

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

> determine in accordance with its own conceptions whether a statute of limitations of a second state bars the right and not merely the remedy."

Both *Myers* and *Maki, supra,* relied upon *Davis v. Mills* (1904), 194 U.S. 451, in which Justice Holmes stated as follows at pages 454-456:

> "• • • the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori,* as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. *But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction.* It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.*
>
> "• • •

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

> "• • • we think that this §554 so definitely deals with the liability sought to be enforced that upon the principles heretofore established it must be taken to affect its substance so far as it can, *although passed at a different time from the statute by which that liability first was created.* • • • " (Emphasis added.)

In *Zang v. Railway Express Co.* (1935), 130 Ohio St. 17, the Ohio Supreme Court cited *Davis* but in a case wherein the limitation was contained in the same section creating the right, it being commented at page 20 of the opinion, as follows:

> "There is a marked distinction between pure statutes of limitation affecting the remedy only which must be specially pleaded as a defense, and special statutory limitations taking away the right itself. In the latter class, time is of the essence of the right, and the lapse of the prescribed period in which an action may be commenced wholly extinguishes the right. • • •"

From *Davis*, it follows that to be such a statute (one barring the right itself), it is not necessary that the statute of limitations be contained in the same statute, or the same act, which creates the right, nor even that it be enacted at the same time that the right was created. A subsequently enacted statute of limitations contained in a separate section will be construed to bar the right, rather than merely the remedy, with respect to a claim unknown at common law created by statute, where it is specifically directed to

the liabaility created by statute. Thus, Justice Holmes in *Davis, supra,* with respect to the statute therein involved, stated at page 455:

> "A further difference is that, while there might be difficulties in construing the general limitation upon actions for penalties as going to the right, this section is so specific that it hardly can mean anything else. • • •"

The New York statute of limitations is as specifically directed to the right of privacy, unknown in New York common law but created by the statute, as was the statute of limitations in *Davis* toward the statutorily created right involved therein. As noted, there is a specific reference in the New York statute to "a violation of the right of privacy under Section 51 of the Civil Rights Law." Nothing could be more specific. No general statute of limitations applicable generally to statutorily created liabilities is involved. Furthermore, the legislative history as attached to plaintiffs' brief indicates that this provision was specifically enacted to apply specifically to the New York statutory right of privacy, rather than being merely part of a comprehensive statute of limitations enactment, even though the statute of limitations was created by amendment to a pre-existing section of the New York Code pertaining to statute of limitations for various enumerated actions. The attachment to plaintiffs' brief indicates that the 1938 act first establishing a statute of limitations for violation of the statutory right of privacy was entitled, "An Act to Amend the Civil Practice Act in

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

Relation to Limitation of Time to Commence Certain Actions." Section 1 of the act provided as follows:

> "Section forty-nine of the civil practice act, is hereby amended by adding thereto a new subdivision, to be subdivision eight, to read as follows:
>
> "An action to recover damages for a violation of the right of privacy under section fifty-one of the civil rights law."

Section 2 of the act related to previously accured rights of action to recover damage for a violation of the right of privacy and provided that such actions "must be commenced within three years from the time this act takes effect, and all such actions not so commenced shall be thereafter completely and forever barred for lapse of time."

Accordingly, we conclude that the New York statute of limitations is so specifically directed to the statutorily created right of privacy, unknown to New York common law, as to constitute a bar to the right and not merely a bar to the remedy, even though enacted by a separate statute enacted many years subsequent to the adoption of the original statute creating the New York right of privacy.

Furthermore, it is unclear as to which Ohio statute of limitations would be applied if the New York statute be deemed to bar the remedy, rather than the right. It is questionable that the four-year limitation of R. C. 2305.09(D) is applicable. Rather, the appropriate Ohio limitation would appear to be either the six-year limitation of R. C.

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

2305.07 with respect to actions upon liabilities created by statute or the one-year limitation of R. C. 2305.11 with respect to actions upon a statutory penalty or forfeiture, depending upon whether the New York statute creates a penalty or forfeiture or merely a liability. With respect to compensatory damages allowed to be recovered by the New York statute, it is arguable that R. C. 2305.07 applies. It is also arguble, however, that, with respect to exemplary damages permitted by the New York statute, the limitation of R. C. 2305.11 would apply if such damages be construed as constituting a penalty or forfeiture. It is unnecessary to resolve this issue in this case, inasmuch as we conclude that the New York statute of limitations properly applies, along with other New York substantive law, since it is so specifically directed to the New York statutorily created liability as to bar the right, not merely the remedy. It may well be that the four-year limitation of R. C. 2305.09(D) applies with respect to actions upon the Ohio common-law right of privacy. However, in the context of this case, there exists no common-law right of privacy, since the parties concede that the substantive law of New York applies.

We, therefore, find no error on the part of the trial court in applying the one-year New York statute of limitations applicable to actions to recover damages for violation of the statutorily created right of privacy since such right is unknown in New York common law, and the statute of limitations is so specifically directed to the statutorily created right, although enacted at a different time by a different act, as to warrant the conclusion that it bars the right, not merely the remedy. Plaintiffs' assignment of error is not well taken.

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

With respect to defendants' appeal from the order with respect to award of expenses as sanctions for failure to comply with discovery, we find there to be no appealable order at this time. Ohio law does not contemplate piecemeal appeals. The order imposing sanctions is appealable when a final judgment to which it is applicable is entered. The final judgment entered with respect to the second court of plaintiffs' amended complaint does not constitute such a final judgment as to permit appeal from the sanction order at this time. It will be reviewable upon appeal from the final judgment entered in the action with respect to the remaining claims. In our view, the order remains interlocutory at this time and can be amended by the trial court. If it were reviewable, it might well be necessary to reverse the order since no evidentiary hearing apparently was held with respect to the reasonableness of the attorney fees awarded. Furthermore, in determining the reasonableness of attorney fees, the criteria to be employed is the reasonableness of the fees in the locality of the forum, not the reasonableness of fees in another state, even though an attorney admitted to practice in another state but not Ohio has been permitted to participate as attorney for a party. A party is not entitled to enhance the sanctions which would otherwise be applied for violation of discovery by employing an out-of-state attorney to assist in the prosecution, or defense, of his case, even though such attorney be permitted specially to practice in Ohio with respect to the pending action. This does not mean that a party cannot be awarded attorney fees with respect to the out-of-state attorney but only that the reasonableness of the fees is to be determined in accordance with the standards of the locality of the forum,

Exhibit E to Defendants' Memorandum in Support—Decision of the Court of Appeals of Franklin County, Ohio, Rendered September 30, 1980

rather than that of some other state. However, we can not finally resolve the issues upon this appeal since there is no appealable order, necessitating dismissal of defendants' appeal.

For the foregoing reasons, defendants' appeal from the order imposing sanctions is dismissed for want of an appealable order, and, with respect to plaintiffs' appeal, the assignment of error is overruled; and the judgment dismissing the second count of the amended complaint is affirmed.

Upon plaintiff's appeal: Judgment affirmed;

Upon defendants' appeal: Appeal dismissed.

STRAUSBAUGH, P.J., and REILLY, J., concur.

Objection to Defendants' Motion to Quash Service of Process; to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue; and for Insufficiency of Process, Filed December 30, 1980.

UNITED STATES DISTRICT COURT,
FOR THE DISTRICT COURT OF NEW HAMPSHIRE.

(Title omitted in printing.)

NOW COMES the plaintiff, Kathy Keeton, through her attorneys, Sheehan, Phinney, Bass & Green, and objects to the defendants' Motion to Quash Service of Process; to Dismiss for Lack of Personal and Subject Matter Jurisdiction and Venue; and For Insufficiency of Process, and requests a hearing on same. Plaintiff will provide this Honorable Court with a memorandum in support of its position in accordance with the ten-day provision of Local Rule 11 (b) (2).

Respectfully submitted,

By W. MICHAEL DUNN, ESQUIRE
SHEEHAN, PHINNEY, BASS & GREEN
Prof. Ass'n.
1000 Elm Street
Manchester, New Hampshire 03101
(603) 668-0300

Dated: December 30, 1980.

Of Counsel:

NORMAN ROY GRUTMAN, Esquire
Grutman, Schafrann & Miller
505 Park Avenue
New York, New York 10022
(212) 888-1900

(Certification omitted in printing.)

Addendum to Plaintiff's Objection, Filed January 6, 1981.

UNITED STATES DISTRICT COURT,
FOR THE DISTRICT COURT OF NEW HAMPSHIRE.

(Title omitted in printing.)

NOW COMES the Plaintiff, Kathy Keeton, through her attorneys, Sheehan, Phinney, Bass & Green and states that on December 30, 1980, she filed with this Court an Objection to the Defendant's Motions to Quash Service of Process; To Dismiss For Lack of Personal and Subject Matter Jurisdiction and Venue; and For Insufficiency of Process. Plaintiff further states that through oversight and error but not neglect, her attorney failed to specifically object to the Defendant's additional request for Alternative Relief.

WHEREFORE, Plaintiff requests that she be permitted to add as an addendum to her earlier objection an objection to the Defendant's request for Alternative Relief.

Respectfully submitted,

KATHY KEETON
By her attorneys,

SHEEHAN, PHINNEY, BASS & GREEN,
Prof. Ass'n.

By: PETER S. COWAN
For W. Michael Dunn

Dated: January 5, 1981

(Certification omitted in printing.)

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories.

UNITED STATES DISTRICT COURT,
FOR THE DISTRICT COURT OF NEW HAMPSHIRE.

(Title omitted in printing.)

NOW COMES the plaintiff, Kathy Keeton, and, pursuant to Rule 33 of the Federal Rules of Civil Procedure, propounds the following interrogatories to be answered by the defendant, Hustler Magazine, Inc., under oath:

1. For the period January 1, 1975 through the present, give:
   (a) the identity of the wholesale magazine distributors serving the State of New Hampshire who have distributed Hustler Magazine, including name and address;

   (b) number of issues provided to each such distributor for distribution;

   (c) number of issues actually sold; and

   (d) number of issues returned.

ANSWER: Your defendant objects to this question as being overly burdensome and not being reasonably intended to lead to discovery of relevant discoverable information. Further your defendant objects to providing this information to counsel for the publisher of a competitor magazine.

See Addenda A. Under Addenda A the letter D refers to magazine distributors. The letter R refers to the magazines

returned. The letter S refers to the number of magazines sold.

Your defendant does not represent that the magazines sold as listed within Addenda A were actually sold to retail buyers within the geographical boundaries of the State of New Hampshire. The wholesale magazine distributors listed in Addenda A are distributors that distribute magazines within the State of New Hampshire, but defendant does not represent that distributors distribute solely within the boundaries of the State of New Hampshire.

Your defendant does not have access to records pertaining to distribution to various wholesalers prior to February 1, 1977. Your defendant does not have compilations for sales to distributors after January 1, 1981.

2. To the extent not covered by the answer to Interrogatory No. 1 above, with respect to the following distributors, Manchester News Co., Inc. (Bedford, New Hampshire), G. Paulsen Co. (Concord, New Hampshire), Weinbaum News (Portsmouth, New Hampshire), Verham News (West Lebanon, New Hampshire), Troy News (Nashua, New Hampshire), Merrimack News (Lawrence, Massachusetts), and County News Distributors (Brattleboro, New Hampshire), for the period of January 1, 1975 to the present, give:

(a) the total number of issues provided to each such distributor for distribution;

(b) the number of issues actually sold; and

(c) the number of issues returned.

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

ANSWER: See answer to #1.

3. For each month from January 1, 1975 through the present, and as to each wholesale magazine distributor mentioned in the answers to Interrogatories No. 1 and No. 2 above, please give:

(a) the number of issues provided to each distributor for distribution;

(b) number of issues actually sold; and

(c) number of issues returned.

ANSWER: Your defendant objects to this interrogatory as being overly broad, burdensome and not reasonably intended to lead to the discovery of relevant information. See Addenda A.

4. With regard to the May, 1976 issue of Hustler Magazine, state:

(a) The total number of copies provided to each of the above wholesale magazine distributors for distribution;

(b) the number of issues actually sold; and

(c) the number of issues returned.

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

ANSWER: Your defendant objects to this interrogatory on the basis of relevancy and further objects on the basis that it would be overly broad and puts an undue burden on the defendant to collate adequate information to provide an answer to this question. Your defendant does further state that 8,073 of Hustler Magazines were sold in the State of New Hampshire during the month of May, 1976. Your defendant represents that this information answers this interrogatory in substance.

5. For the period January 1, 1975 through the present, give the issue price of Hustler Magazine and discuss the date and amount of any issue price changes that occurred in said period.

ANSWER: Your defendant objects to this interrogatory for the reason that it is in no way relevant to the jurisdictional and venue issues before this court. On information and belief the price of Hustler Magazine on January 1, 1975 was approximately $1.75 per issue. As of March, 1981 the price of the magazine was increased to $3.50 per issue. The price of the magazine was increased from time to time between January 1, 1975 to March, 1981.

6. In terms of total distribution within the State of New Hampshire, where does Hustler Magazine rank in the order of monthly magazines distributed in this state at present, and how, if at all, has this ranking changed in the period of January 1, 1975 through the present?

ANSWER: Your defendant objects to this question as being overly broad and not relevant to the issues at hand.

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

Further your defendant states that this information is not available and is not something that is compiled by your defendant organization or any other organization to the defendant's knowledge. The only information available concerning total distribution of Hustler Magazine and its rank in comparison to other monthly magazines is publications that pertain to national distribution. This information cannot be translated into a ranking on a monthly or annual basis.

7. In terms of total sales within the State of New Hampshire, where does Hustler Magazine rank in the order of monthly magazines sold in this state at present, and how, if at all, has this ranking changed in the period of January 1, 1975 through the present?

ANSWER: Your defendant objects to this question for the same reason that it objected to question #6. The question is overly broad and would be an undue burden for the defendant to answer. The defendant is unaware of any source of information that would provide rankings for either distribution or dollar sales on a state basis. Your defendant does not believe that this information is available from any reasonable source.

8. Do you deny that Hustler Magazine is the third largest selling monthly magazine in the State of New Hampshire?

ANSWER: While your defendant does not have any specific New Hampshire statistics, based upon the national placement for sales of Hustler Magazine vis-a-vis

other monthly magazines, your defendant denies that it is the third largest selling monthly magazine in the State of New Hampshire.

9. Identify each individual and/or corporation and/or company and/or other association or organization responsible for distributing Hustler Magazine to the wholesale magazine distributors servicing New Hampshire during the period of January 1, 1975 through the present, and give dates indicating the periods during which any such persons or entities were responsible for such distribution.

ANSWER: Capitol Distributors of Derby, Connecticut, Charleston Building, Derby, Connecticut, From January, 1975 to December 15, 1976; Flynt Distribution Co., Inc., 2029 Century Park East, Suite 2800, Los Angeles, California, From December, 1976 to present.

10. Identify Flynt Distributing Company, Inc. of 2029 Century Park East, Suite 3800, Los Angeles, California, giving names and addresses of directors and of officers, a statement of the corporate purpose, the state where and the date when incorporated, and the entity to Flynt Distributing Co., Inc. is a successor.

ANSWER: Your defendant objects to this question as requesting information not relevant to the issues before this court and not reasonably intended to lead to the discovery of relevant information. Further your defendant objects on the basis that it invades the privacy of others not involved in the case.

Your defendant does disclose that Larry C. Flynt is the director of Flynt Distributors, Co., Inc. Larry Flynt is

chairman of the board and chief executive officer of Flynt Distributors, Co., Inc. Larry C. Flynt is not and never has been a resident of the State of New Hampshire. Further, upon information and belief, none of the other officers of Flynt Distributors, Co., Inc. are or ever have been residents of the State of New Hampshire. Flynt Distributors, Co., was incorporated on April 28, 1976 in the State of Ohio with a principal place of business in Los Angeles, California. Flynt Distributors, Co., Inc. is not a successor corporation to any other corporation.

11. List the titles of magazines distributed by Flynt Distributing Co., Inc. to anyone in New Hampshire, and to whom are they distributed?

ANSWER: Your defendant objects to this question as being overly broad and would create an undue burden upon the defendant to try to collate such a list. This question cannot be reasonably expected to lead to information that would be relevant to the issues at hand or to the case at hand. Further your defendant objects to providing such business information to a competition and represents that such a disclosure of information would be an invasion of defendant's business records. Further your defendant objects on the basis that this question pertaining to Flynt

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

Distributors, Co., Inc. should not properly be directed to Hustler Magazine, Inc.

Submitted by,

KATHY KEATON
By Her Attorneys

SHEEHAN, PHINNEY, BASS & GREEN
Prof. Ass'n.

By W. MICHAEL DUNN

Dated: January 18, 1981.

HUSTLER MAGAZINE, Inc.

By LARRY FLYNT
(duly authorized)

(Jurat omitted in printing.)

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		FEB 1977	MAR 1977	APR 1977	MAY 1977	JUNE 1977	JULY 1977	AUG 1977	Se 19
MANCHESTER NEWS	D	1,200	700	1,200	300	300	1,000	1,000	
MANCHESTER, N.H.	R	89	107	311	9	3	149	350	1
	S	1,111	593	889	291	297	851	650	1
[illegible] CO.	D	50	100	Ø	100	100	100	100	1
[illegible] N.H.	R	Ø	Ø	Ø	Ø	Ø	Ø	Ø	
	S	50	100	Ø	100	100	100	100	
[illegible] NEWS	D	2,600	Ø	3,200	2,600	3,000	3,000	3,600	3
[illegible] N.H.	R	107	Ø	444	459	560	554	624	
	S	2,493	Ø	2,756	2,141	2,440	2,446	2,976	2
F.P. TROJI NEWS	D	3,000	Ø	3,000	4,000	3,500	3,500	4,000	4
NASHUA, N.H.	R	134	Ø	376	363	694	1,667	1,768	2
	S	2,866	Ø	2,624	3,637	2,806	1,833	2,232	1
VERNON NEWS [illegible]	D	3,500	Ø	Ø	3,500	4,000	4,000	4,200	4
[illegible] N.H.	R	396	Ø	Ø	705	1,974	1,045	953	1
	S	3,104	Ø	Ø	2,795	2,026	2,955	3247	3
ROBITAILLE & SON	D								
[illegible] N.H.	R								
	S								
HERALD-[illegible]	D	6,500	6,500	6,500	6,500	6,500	7,000	6,300	7
[illegible], [illegible]	S	1,170	645	1,512	1,610	2,054	2,100	2302	2
	S	5,330	5855	4,988	4,882	4,446	4,900	3,998	4
[illegible] NEWS	D	1,700	Ø	Ø	Ø	2,000	2,200	2,200	2
[illegible]	R	103	Ø	Ø	Ø	962	974	894	
	S	1,597	Ø	Ø	Ø	1,038	1,226	1,306	1
Total									
	D	18550	7300	13900	17,000	19,400	20,800	21,400	2
	R	1,999	752	2,643	3,154	6,247	6,489	6,891	9
	S	16,551	6,548	11,257	13,846	13,153	14,311	14,509	12

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		NOV 1977	DEC 1977	JAN 1978	FEB 1978	MAR 1978
MANCHESTER NEWS	D	800	1,000	1,000	1,000	900
MANCHESTER N.H.	C	613	335	385	79	176
	S	187	665	615	921	724
C. PAULSON	D	150	150	150	150	150
CONCORD NH.	C	Ø	1	Ø	Ø	10
	S	150	149	150	150	140
AMERICAN NEWS	D	3,200	3,000	3,000	3,000	3,000
PORTSMOUTH N.H.	C	1,048	721	879	890	928
	S	2,152	2,279	2,121	2,110	2,072
E.P. TRAW	D	4,000	3,500	3,000	3,000	2,700
NASHUA N.H.	R	1,822	1,430	1,049	657	856
	S	2,178	2,070	1,951	2,343	1,844
VERMONT NEWS CORP	D	3,200	3,500	3,500	3,500	3,000
W. LEBANON N.H.	C	763	1,274	1,128	929	592
	S	2,437	2,226	2,372	2,571	2,408
DeRADELLI & SCOTT	D					
NORTH N.H.	C					
	S					
MERRIMACK NEWS	D	7,000	7,000	6,000	6,500	6,000
LAWRENCE, MASS	D	3,006	2,987	2,158	2,879	3,097
	S	3,994	4,013	3,842	3,621	2,903
COUNTRY NEWS	D	1,600	1,600	1,600	1,600	1,600
BRATTLEBORO, VT	R	362	326	312	287	378
	S	1238	1,274	1,288	1,313	1,222
TOTAL	D	19,950	19,750	18,250	18,750	17,350
	C	7,614	7,074	5,911	5,721	6,037
	S	12,336	12,676	12,339	13,029	11,313

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		Aug 1978	Sept 1978	Oct 1978	Nov 1978	Dec 1978	Jan 19
[illegible] Record	D	900	900	900	900	900	1,0
	R	183	110	92	155	51	2
	S	717	790	808	745	849	7
[illegible] Falcon	D	250	250	250	300	300	4
	R	4	9	8	7	11	
	S	246	241	250	293	289	34
[illegible] News	D	2,900	2,500	2,400	2,500	2,500	2,1
	R	843	179	223	340	391	4
	S	1,957	2,321	2,177	3,160	2,109	2,1
	D	3,200	2,600	2,500	2,700	2,700	3,
[illegible] News	R	647	240	192	528	259	
	S	2,553	2,360	2,308	2,172	2,441	2,5
	D						
Tico News	R						
	S						
[illegible]	D						
	R						
	S						
Merrimack [illegible]	D	8000	8000	7,500	7500	6,900	6,9
Lawrence Mass	R	3,787	2312	2,822	2,689	2,600	2,3
	S	4,213	5,688	4,678	4,811	4,000	4,4
Country News	D	1,600	1,200	1,200	1,200	1,400	1,4
Brattleboro, VT	R	582	83	226	78	252	41
	S	1,018	1,117	974	1,122	1,148	98
[illegible]		16,750	15,450	14,750	15,100	14,600	15,4
	R	1,046	2,933	3,555	3,797	3,764	4,2
	S	10,704	12,517	11,195	12,303	10,836	11,10

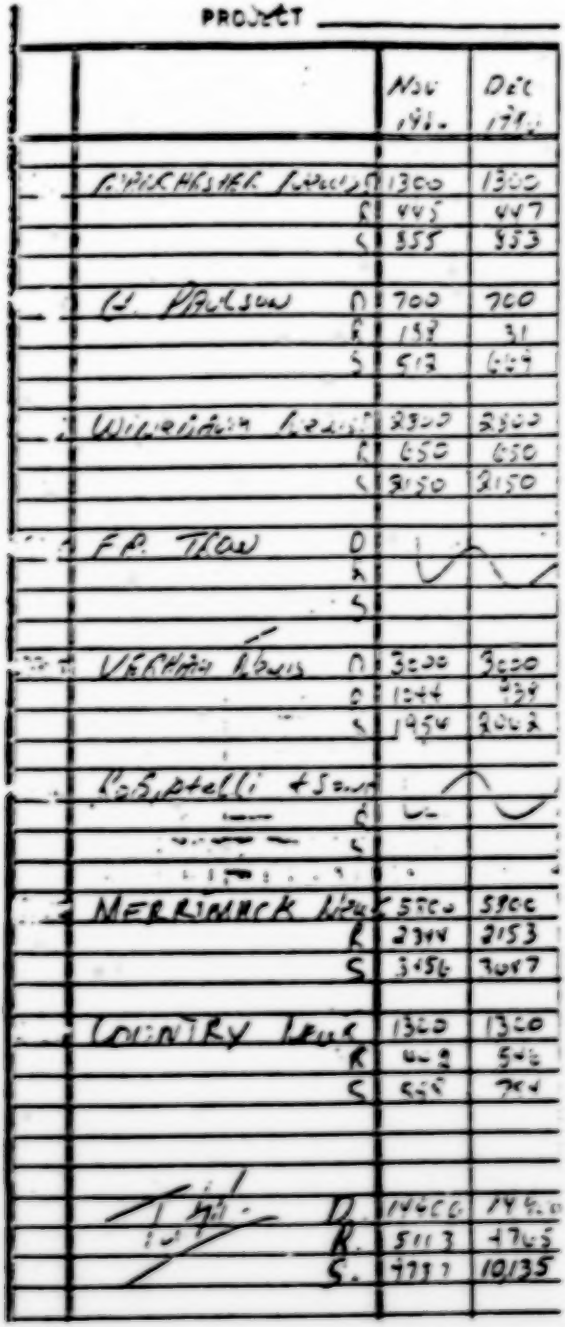
Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		May 1974	June 1974	July 1974	Aug 1974	Sept 1974
LITCHESTER NEWS	D		1,100	1,100	1,100	1,100
	R		210	329	249	195
	S		890	771	851	907
C. WILSON	D	400	400	500	500	530
	R	160	42	141	189	147
	S	240	358	359	311	402
WATERMAN NEWS	D		3,000	3,200	3,200	3,200
	R		929	1,026	900	814
	S		2,071	2,174	2,300	2,386
	D	Ø	3,300	3,500	3,500	3,500
LOCUST NEWS	R	Ø	1,319	1,181	903	1,101
	S	Ø	1,981	2,319	2,597	2,399
	D					
TRI-W NEWS	R					
	S					
ANGELELLI & SONS						
	R					
	S					
MERRIMACK NEWS	D	6,500	6,500	6,500	6,500	6,500
LAWRENCE E. WILSON	R	2996	2,435	3,296	2,620	2,000
	S	3,504	4,065	3,204	3,880	4,500
COUNTRY NEWS	D	1,500	1,500	1,200	1,200	1,200
FRANKLIN-BIRCH, VT	R	Ø	538	288	274	239
	S	Ø	962	912	926	961
Total	D	8,400	15,800	16,000	16,000	16,430
	R	3,156	5,473	6,261	5,135	4,496
	S	3,744	10,327	9,739	10,865	11,524

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories

		Feb 1980	March 1980	April 1980	May 1980	June 1980	J 1
		1300	1350	1350	1300	1300	1
		300	338	324	434	471	
		1000	962	1021	961	839	
		650	650	900	900	850	
		190	162	390	212	356	
		460	488	510	515	414	
		3700	3500	3500	3500	3400	
		1544	1576	1469	1583	1553	1
		2154	1964	2031	1917	1847	1
		3500	3900	3500	3500	3400	
		1523	1732	1632	1435	1374	1
		2277	2068	2117	1907	1776	2
		5900	5800	6000	6000	6200	6
		1883	1719	1576	2019	2521	2
		3917	4081	4424	3982	3279	3
		1400	1400	1400	1400	1400	1
		450	477	442	463	443	
		456	921	958	937	757	
		--	--	-			
		16,650	16,500	16,350	16,400	16,000	16
		5950	10,070	5730	6584	7568	6
		10,700	10,430	11,112	10,212	9432	9

Answers of Defendant Hustler Magazine, Inc. to Plaintiff's Interrogatories



PROJECT

		Nov 19[illegible]	Dec 19[illegible]
[illegible]	D	1300	1300
	R	445	447
	S	555	553
[illegible]	D	700	700
	R	197	31
	S	517	669
[illegible]	D	2900	2900
	R	650	650
	S	2150	2150
[illegible]	D		
	R		
	S		
[illegible]	D	3000	3000
	R	1044	939
	S	1956	2062
[illegible]	D		
	R		
	S		
MERRIMACK [illegible]		5900	5900
	R	2344	2153
	S	3456	3747
COUNTRY [illegible]		1300	1300
	R	456	546
	S	644	754
[illegible]	D	14000	14[illegible]
	R	5113	4765
	S	7777	10135

Excerpt from Transcript of Oral Argument in the District Court for the District of Massachusetts, held on April 9, 1981.

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

CA 80-490-C CAFFREY, CH. J.

(Title omitted in printing.)

Appearances:

For the Plaintiff: Norman Roy Grutman, Esq., and Jeffrey H. Daichman, Esq., Grutman, Schafrann & Miller, 505 Park Avenue, New York, New York 10022.

For the Defendant: C. William Brownfield, Esq., Brownfield, Bowen, Bally & Sturtz, 140 East Town Street, Columbus, Ohio, 04315 and Dort S. Bigg, Wiggin & Nourie, 875 Elm Street, Manchester, New Hampshire 03101.

Courtroom No. 1
Federal Building
Boston, Massachusetts

April 9, 1981

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(9/10) there was enough doing business or appearance in in New Hampshire by the de minimis appearance of Hustler Magazine there, while that might help in a certain context to decide whether personal service had been proper, it

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certainly is no substitute for an analysis which I just mentioned and as Hensen v. Denkler requires. Not just that they had some contact with the state, but that the contact which gave rise to the cause of action had a significant nexus with New Hampshire.

Here we have not only three other available fora, but we have no, even the testimony I've given the Court through her previous deposition in the Ohio case shows, no one called her that she knows of, she has no knowledge of any New Hampshire contact. I should point out to you that the only evidence that's before you is the evidence we've presented, with the exception of our answers to interrogatories. There were no affidavits, evidence of any other sort. And the preponderance of the evidence standard does apply.

Our evidence conclusively shows that whatever contact the defendants may have here, and parenthetically, your Honor, I would point out again, LFP is merely a holding company. They were

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(22) not to be confused by Mr. Brownfield's claims that the presence or the connection or the notoriety or the celebrity of the plaintiff is in some way a constitutional or jurisdictional test.

The cases cited by Judge Laughlin and the cases outside of New Hampshire, to which we have referred in our memorandum, make it very plain that the reference and the focus is only on the defendant. And what the defendant's presence in this case is can be derived from such information as the defendants chokingly disclose in the interrogatories. And I don't know whether your Honor has

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been provided with a copy of them. They were just served upon me as I walked into the courthouse.

But what they disclose on the admissions of the circulation of this magazine running from 1975 onward show consistent, not sporadic, substantial and continuous business activity by the defendants who are sued in this case.

Even in this day of soaring inflation, your Honor, 16 to 20,000 copies a month sold on a newstand at $2 the copy, cannot be called as Mr. Brownfield does, de minimus contacts.